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In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

ANNA WRIGHT and ROLAND WRIGHT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Reasons for granting the petition	7
Conclusion	16

CITATIONS

Cases:

Abbott v. *Weinberger*, Civ. No. C-74-194 (N.D. Ohio Feb. 11, 1976)	5-6
Board of School Commissioners v. *Jacobs*, 420 U.S. 128	9
Califano v. *Abbott*, 430 U.S. 924	2, 5
Califano v. *Aznavorian*, 439 U.S. 170	10
Califano v. *Boles*, No. 78-808 (June 27, 1979)	10
Califano v. *Goldfarb*, 430 U.S. 199	5, 14-15
Califano v. *Jobst*, 434 U.S. 47	14-15
Chevron Oil Co. v. *Huson*, 404 U.S. 97	7, 13
Frontiero v. *Richardson*, 411 U.S. 677	14
Gerstein v. *Pugh*, 420 U.S. 103	9
Jimenez v. *Weinberger*, 417 U.S. 628	14
Kahn v. *Shevin*, 416 U.S. 351	14
Kremens v. *Bartley*, 431 U.S. 119	9
Los Angeles Dept. of Water and Power v. *Manhart*, 435 U.S. 702	15
Mathews v. *De Castro*, 429 U.S. 181	14
Mathews v. *Lucas*, 427 U.S. 495	14

Cases—Continued — Page

Railroad Retirement Board v. *Kalina*, 431 U.S. 909 11
Schlesinger v. *Ballard*, 419 U.S. 498 14
Sosna v. *Iowa*, 419 U.S. 393 9
United States v. *Clark*, No. 78-1513 (Feb. 26, 1980) 11
United States v. *King*, 395 U.S. 1 11
United States v. *Testan*, 424 U.S. 392 11
Weinberger v. *Salfi*, 422 U.S. 749 ..... 10, 15
Weinberger v. *Wiesenfeld*, 420 U.S. 636.... 14

Statutes:

Social Security Act, Title II, 42 U.S.C. (1976 ed.) 401 *et seq.*:

Section 202, 42 U.S.C. 402 ..... 14, 16
Section 202(b), 42 U.S.C. 402(b) 4
Section 202(c), 42 U.S.C. 402(c) 2, 4, 5
Section 202(c)(1)(C), 42 U.S.C. 402(c)(1)(C) 2
Section 202(f)(1)(D), 42 U.S.C. 402(f)(1)(D) 5
Section 202(j)(1), 42 U.S.C. 402(j)(1) 3, 6, 11-12
Section 204(a), 42 U.S.C. 404(a) 4

Pub. L. No. 95-216, Section 334, 91 Stat. 1544, 42 U.S.C. (Supp. I) 426 16

Miscellaneous:

S. Rep. No. 95-572, 95th Cong., 1st Sess. (1977) 12, 15

In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

ANNA WRIGHT and ROLAND WRIGHT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 603 F.2d 666. The opinion of the district court (App. D, *infra*, 18a-30a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 16a) was entered on August 14, 1979, and a petition for rehearing was denied on October 23, 1979 (App. C, *infra*, 17a). On January 10, 1980, Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including March 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this case became moot when the named plaintiff's claim was satisfied in full prior to certification of the case as a class action.

2. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied Social Security benefits under a statutory section later held unconstitutional.

3. Whether the decision in *Califano* v. *Abbott*, 430 U.S. 924 (1977), holding the support requirement of 42 U.S.C. 402(c)(1)(C) of the Social Security Act unconstitutional, should be given retroactive effect.

STATUTES INVOLVED

1. Section 202(c) of the Social Security Act, 42 U.S.C. (1976 ed.) 402(c), provided in relevant part:

> (1) The husband (as defined in section 416 (f) of this title) of an individual entitled to old-age or disability insurance benefits, if such husband—
>
> * * * * *

> (C) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual—
>
> > (i) if she had a period of disability which did not end prior to the month in which she became entitled to old-age or disability insurance benefits, at the beginning of such period or at the time she became entitled to such benefits, or
> >
> > (ii) if she did not have such a period of disability, at the time she became entitled to such benefits,
>
> and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits. * * *

2. Section 202(j)(1) of the Social Security Act, 42 U.S.C. (1976 ed.) 402(j)(1), provided in pertinent part:

> [a]n individual who would have been entitled to a benefit under subsections (a) to (g) * * * of this section for any month after August 1950 had he filed application therefor prior to the end of such month shall be entitled to such benefits for such month if he files application therefor prior to the end of the twelfth month immediately succeeding such month.
>
> * * * * *

3. Section 204(a) of the Social Security Act, 42 U.S.C. 404(a), provides in pertinent part:

> Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, * * *
>
> (2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, * * *

STATEMENT

On September 1, 1972, respondent Roland Wright applied for husband's insurance benefits pursuant to Section 202(c) of the Social Security Act (42 U.S.C. 402(c)). That statutory provision authorizes the payment of social security benefits to an elderly or disabled husband of an insured wage earner. At the time of respondent's application, the statute required a showing that the wage earner had provided at least one-half of her husband's support. No such showing of dependency, however, was required of a wife seeking benefits on her husband's account (42 U.S.C. 402(b)). Respondent's application for husband's insurance benefits was denied at all levels of the administrative process because he failed to satisfy the

statutory support requirement, and on August 21, 1975, the Secretary rendered a final decision denying respondent's claim on that ground (App. E, *infra*, 31a-44a).

On October 8, 1975, respondent and his wife, respondent Anna Wright, filed this action in the United States District Court for the Northern District of Illinois on behalf of "all applicants for husband's insurance benefits * * * whose applications * * * have been denied solely because of the statutory [support] requirement" (App. D, *infra*, 19a-20a). They sought (1) a declaration that the support requirement of Section 202(c) unconstitutionally discriminates on the basis of gender, (2) an injunction against further enforcement of the support provision, and (3) an order requiring the Secretary to pay benefits to all members of the class from the date that such persons would have been entitled to benefits but for the support requirement (*ibid.*). On March 2, 1977, while this case was pending in the district court, this Court decided *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), holding unconstitutional Section 202(f)(1)(D) of the Social Security Act, 42 U.S.C. 402(f)(1)(D), which attached the same support condition to entitlement to widower's insurance benefits. On March 21, 1977, the Court invalidated the support requirement of Section 202(c) in *Califano* v. *Abbott*, 430 U.S. 924 (1977).[1] Shortly after the decisions in *Gold-*

[1] The Court affirmed, without opinion, the decision of the district court in *Abbott* v. *Weinberger*, Civ. No. C-74-194

farb and *Abbott*, the Secretary agreed to pay benefits, from the effective date of their applications, to all named plaintiffs in pending cases brought to challenge the support requirement.[2] Accordingly, on May 5, 1977, respondent Roland Wright was paid husband's insurance benefits effective from September 1971, one year before he filed his original application (see 42 U.S.C. 402(j)(1)).

On May 12, 1977, prior to any class certification by the district court, the Secretary moved to dismiss this case as moot. The Secretary later filed an alternative motion for summary judgment on the ground, *inter alia*, that the decision in *Abbott* should not be accorded retroactive effect. On September 21, 1977, the district court granted respondents' motion for class certification and entered summary judgment for the respondents.[3] In addition, the court ordered the

(N.D. Ohio Feb. 11, 1976). The district court in *Abbott* denied the plaintiff's motion for class relief, and the judgment there accordingly favored only the named plaintiff.

[2] These payments were made immediately after the *Goldfarb* and *Abbott* decisions, at a time when the full implications of the retroactivity question (see pages 10-16, *infra*) had not yet been considered.

[3] The district court certified two classes: (1) all applicants for husband's insurance benefits whose applications had been denied by the Secretary solely because of the support requirements, and (2) all insured, married wage earners eligible for social security benefits whose husbands are members of the first class (App. A, *infra*, 3a). Since the district court's favorable judgment required the payment of benefits only to the husbands, it is unnecessary for this Court to consider the validity of the certification of the latter class (but see App. A, *infra*, 5a n.5). For similar reasons, we will hereafter refer to Mr. Wright as the respondent.

Secretary to pay each class member "all the benefits he would have received had his application * * * been granted originally without regard to the support requirement" (C.A. App. 100; App. A, *infra*, 13a; App. D, *infra*, 30a).[4]

The court of appeals affirmed. The court held that the mootness of respondent's individual claim did not preclude a subsequent class certification from reviving the case (App. A, *infra*, 8a-10a) and that sovereign immunity did not bar the award of retroactive social security benefits to the class (*id.* at 10a-13a).[5]

REASONS FOR GRANTING THE PETITION

The questions presented by this petition raise significant issues concerning the application of prior decisions of this Court and involve principles of continuing importance with regard to justiciability and sovereign immunity. These questions are now, or previously have been, before the Court, but they remain unresolved. In addition, the Secretary estimates that the decision below, unless reversed, will require the

[4] "C.A. App." refers to the appendix in the court of appeals.

[5] The court of appeals did not consider the Secretary's contention that retroactive application of *Goldfarb* and *Abbott* is inappropriate under the principles identified in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), because of what it interpreted as the government's concession of that issue at oral argument (App. A, *infra*, 14a n.17). The Secretary's petition for rehearing informed the court that no such concession was intended.

expenditure of approximately $62 million from the Social Security Trust Fund for a purpose that does not further the aims of the Social Security Act.

1. The question whether this case was mooted by the full satisfaction of respondent's claim prior to the district court's certification of the class is closely related to one of the questions currently before the Court in *United States Parole Commission* v. *Geraghty*, No. 78-572 (argued Oct. 2, 1979). There, as here, the issue is whether a class certification after a case has become moot as to the named plaintiff can operate to revive the case and restore justiciability to the litigation.[6] We have explained in our brief in *Geraghty* (at pages 23-41) why a class certification may not "relate back" to revive a case in circumstances like those in *Geraghty* and the instant case. We rely on that analysis here.[7]

Respondent's claim became moot when the Secretary paid him husband's insurance benefits on May 5, 1977, retroactive to one year before the date of his application. Upon the mooting of respondent's claim, the case ended, and there was no longer a case

[6] In *Geraghty*, the respondent instituted suit to challenge the federal parole release guidelines, but he was released from prison while his case was pending on appeal. The court of appeals, although recognizing that the case had thereby become moot, nonetheless held that a subsequent class certification could revive the case and remanded for a determination of whether the class should be certified. See also *Deposit Guaranty National Bank* v. *Roper*, No. 78-904 (argued Oct. 2, 1979).

[7] We have furnished respondent with a copy of the government's brief in *Geraghty*.

or controversy under Article III of the Constitution. The district court's belated class certification, more than four months later (on September 21, 1977), could not restore justiciability to the litigation. See *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975); *Kremens* v. *Bartley*, 431 U.S. 119, 132-133 (1977); *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128, 129 (1975). Although recognizing the general validity of this principle, the court of appeals relied upon this Court's observation in *Sosna* v. *Iowa*, *supra*, 419 U.S. at 402 n.11, and *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975), that there may be extraordinary circumstances that would permit a subsequent class certification to " 'relate back' to the filing of the complaint." The "relation back" rule applies, however, only when the claim asserted by the named plaintiff and the other members of the class is so transient that review would otherwise be unavailable (419 U.S. at 402 n.11; 420 U.S. at 110 n.11).

The claims in this case are not of that character. They do not involve a transitory state of affairs, but rather consist of demands for liquidated sums of money allegedly due and owing for periods in the past. That sort of claim can be preserved for review at any time within the appropriate statute of limitations. Moreover, this is not a case in which the named plaintiff's claim became moot soon after class certification was sought. Respondent moved to certify the classes in February 1977 (App. A, *infra*, 3a), several months before the Secretary satisfied respondent's individual complaint.

The court of appeals therefore erred in concluding that this case continued to present a case or controversy after respondent's claim became moot.[8] In view of the similarity of the mootness question to that in *Geraghty*, the Court should postpone action on this petition until it has decided *Geraghty*. If the Court accepts our mootness argument in *Geraghty*, the judgment of the court of appeals should be vacated and the case remanded for reconsideration in light of that decision.

2. This case again presents the question whether sovereign immunity bars the award of retroactive monetary relief to persons denied Social Security benefits under a statutory section that has been held to be unconstitutional. That issue has been before this Court on several prior occasions, but it has not yet been necessary for the Court to address it. See, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *Califano* v. *Boles*, No. 78-808 (June 27, 1979); *Califano* v. *Aznavorian*, 439 U.S. 170 (1978). It remains an issue of substantial practical importance to the administration not only of the Social Security Act, but also of other federal benefit programs. See *United States* v. *Clark*, No. 78-1513 (Feb. 26, 1980).[9]

This Court has held that monetary relief for past injury is not available against the United States unless Congress has specifically authorized such relief and unequivocally waived the government's sovereign immunity. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *King*, 395 U.S. 1, 4 (1969). No statute authorizes money damages for past periods during which payments were withheld pursuant to a statute that is later declared to be unconstitutional. Specifically, Congress has not waived sovereign immunity to permit the payment of damages to those injured by unconstitutional provisions of the Social Security Act. Labeling those damages "retroactive benefits" does not lift the bar.

The provisions of the Social Security Act invoked by the court of appeals to deduce a waiver of sovereign immunity do not satisfy the *Testan* criteria. Although Section 202(j)(1) of the Act, 42 U.S.C. 402

[8] The court of appeals also remarked (App. A, *infra*, 9a) that the payment of retroactive benefits provided respondent with only part of the relief sought, because he had also requested a determination that the Secretary's finding that he was ineligible for benefits was erroneous. But that latter request was also moot, because the payment of retroactive benefits satisfied respondent's claim for pre-*Abbott* entitlement, and the Secretary no longer disputed her obligation to pay prospective benefits, including benefits to respondent, without regard to the invalidated support requirement. After this Court's decision in *Abbott*, there was simply no need for the district court to provide respondent with either the injunctive or the declaratory relief he sought.

[9] The payment of retroactive benefits to the class in this case would cost approximately $40 million; an additional $22 million would be required to pay retroactive benefits to claimants affected by the *Goldfarb* decision. These figures do not include the administrative costs of identifying and making payments to the beneficiaries. In addition, other federally funded retirement systems, such as the Railroad Retirement Act, contained similar gender-based support requirements (see *Railroad Retirement Board* v. *Kalina*, 431 U.S. 909 (1977)), and the decision here may well determine the availability of retroactive payments under those programs as well.

(j)(1), permits the payment of benefits for up to one year prior to the filing of a valid application for benefits, that statute expressly limits eligibility for retroactive benefits to "individual[s] who *would have been entitled* to a benefit" for the months preceding the date of application (emphasis added). The statute, therefore, does not permit the payment of retroactive benefits to claimants who were not entitled to them under the Act for the retroactive period in question. Rather, Section 202(j)(1) was intended "to assure that an individual who, for one reason or another, could or did not make a timely application for benefits would not lose any of the benefits to which he would have been entitled [had he made a timely application]." S. Rep. No. 95-572, 95th Cong., 1st Sess. 29 (1977).[10]

Because there has been no clear determination by Congress to waive sovereign immunity from the payment of retroactive monetary benefits in these circumstances, the court of appeals erred in subjecting the government to liability for such benefits. Only

[10] Similarly, Section 204(a) of the Act, 42 U.S.C. 404(a), also relied upon by the court below (App. A, *infra*, 12a-13a), is not a waiver of sovereign immunity from damages liability under a statute later held unconstitutional. Section 204(a) directs the Secretary to make proper adjustments "[w]henever [he] finds that more or less than the correct amount of payment has been made to any person." The purpose of this provision is to permit the Secretary to rectify accounting or computational errors made in determining the amount of benefit checks or to correct administrative errors in the application of the statute, not to alter the conditions of eligibility themselves.

prospective relief, running from the date of judgment, is available to plaintiffs such as respondent who challenge a statute that denies benefits.

3. Even if there had been a waiver of sovereign immunity, retroactive relief is inappropriate here in light of the principles articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In that case, the Court identified three factors that have been considered in determining whether a decision should be given retroactive effect (404 U.S. at 106; citations omitted):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Application of these criteria indicates that the decision below is incorrect. First, the Secretary reasonably relied on the state of the law before *Goldfarb* in denying benefits to respondent and the class members. Indeed, the Secretary had no alternative, because pay-

ment of benefits to nondependent husbands prior to *Goldfarb* and *Abbott* was precluded by the unambiguous requirements of the Social Security Act. Nor was the holding in *Goldfarb* "clearly foreshadowed" by prior decisions of this Court. Although pre-*Goldfarb* decisions of the Court had struck down gender-based federal legislation (see *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975)), there was also a distinct and contemporaneous contrary line of authority. See, *e.g.*, *Kahn* v. *Shevin*, 416 U.S. 351 (1974); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975). Cf. *Mathews* v. *Lucas*, 427 U.S. 495 (1976). Indeed, *Goldfarb* itself was decided by a 5-4 vote, and Mr. Justice Stevens, who cast the deciding vote, found much to agree with in the dissenting opinion. See *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 217-219 (Stevens, J., concurring in the judgment).

In addition, the statutory purpose would not be served by awarding retroactive benefits to the class represented by respondent. Benefits paid under Section 202 of the Social Security Act are designed to ameliorate the economic difficulties caused by the loss of earnings when a wage earner retires or dies. The legislative decision to make a particular class of persons eligible reflects a determination by Congress that persons in the class are likely to have been dependent on the wage earner. See, *e.g.*, *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974); *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 213 (plurality opinion); *Mathews* v. *De Castro*, 429 U.S. 181, 185-186 (1976); *Califano*

v. *Jobst*, 434 U.S. 47, 52 (1977). The members of respondent's class were, by definition, not dependent on the insured wage earner. Moreover, any economic difficulties that the class members did suffer because of the wage earner's death or retirement are redressed by the award of prospective benefits, which are designed to meet current needs. See S. Rep. No. 95-572, 95th Cong., 1st Sess. 29 (1977). A lump sum award of retroactive benefits to non-dependent husbands simply bears no relation to the aims of the Act.

Finally, the payment of such a windfall would produce substantial inequitable results. It would impose a severe drain on the Social Security Trust Fund (see note 11, *supra*), a drain that was not contemplated in the actuarial estimates underlying the program. This in turn might require further legislative actions to protect the fund—actions that would be likely to diminish the protections available to those who actually depend on social security benefits to meet daily needs. Cf. *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U.S. 702, 721 (1978); *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 775-776.

The unfairness of permitting a windfall recovery in these circumstances is emphasized by the congressional reaction to *Goldfarb* and *Abbott*. Recognizing that a great many persons who became entitled to Social Security benefits by virtue of those decisions are retired state, local, or federal employees who are also receiving pensions based on their government service, Congress required that the amounts available from

such pensions be deducted from the benefits paid under the Social Security Act (Pub. L. No. 95-216, Section 334, 91 Stat. 1544, 42 U.S.C. (Supp. I) 426, enacted Dec. 20, 1977). Congress has thus adjusted the benefits currently available under Section 202 of the Act to reflect an equitable distribution of the resources of the Trust Fund among competing claimants. An award of retroactive benefits, unaffected by this adjustment, would be inconsistent with this congressional balancing and would serve no reasonable policy goal.

CONCLUSION

The petition for a writ of certiorari should be granted. If the Court concludes that *United States Parole Commission* v. *Geraghty*, No. 78-572, is moot, the judgment of the court of appeals should be vacated and the case remanded for reconsideration of the question of mootness in light of that decision. If the Court concludes that this case is not moot, the case should be set for plenary consideration on the merits.

Respectfully submitted.

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MARCH 1980

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-2288

ANNA WRIGHT and ROLAND WRIGHT, individually and on behalf of all others similarly situated,
PLAINTIFF-APPELLEES

v.

JOSEPH A. CALIFANO, Secretary of the Department of Health, Education and Welfare,
DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 75-C-3377—ALFRED Y. KIRKLAND, *Judge*

Argued October 27, 1978

Decided August 14, 1979

Before FAIRCHILD, *Chief Judge*, PELL and TONE, *Circuit Judges*.

TONE, *Circuit Judge.* The two principal issues raised in this case are (1) whether the doctrine of sovereign immunity bars the award of erroneously withheld Social Security Act benefits in an action under the judicial review provisions of the Act and (2) whether the district court's order is so ambiguous as to require remand for clarification. We answer both questions in the negative and affirm the district court's judgment granting relief to the plaintiff class.

On September 1, 1972, plaintiff Roland Wright applied for husband's insurance benefits under § 202 (c) of the Social Security Act, 42 U.S.C. § 402(c).[1] The Secretary denied Wright's initial application for failure to satisfy the one-half support requirements of § 202(c)(1)(C). That decision was affirmed in subsequent administrative appeals; Wright received the last administrative decision denying his claim on August 21, 1975. He and his wife filed this action on October 8, 1975 challenging the constitutionality of § 202(c)(1)(C) and seeking to represent two classes:

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[1] In pertinent part, § 202(c) provides that:

> (1) The husband . . . of an individual entitled to old-age or disability insurance benefits, if such husband . . . , (C) was receiving at least one-half of his support, . . . , from such individual . . . , and filed proof of such support . . . , shall be entitled to a husband's insurance benefit . . . .

42 U.S.C. § 402(c). Under the provisions of § 202(b), as amended, 42 U.S.C. § 402(b), women seeking "wife's insurance benefits" are not required to make any such showing.

> (1) All applicants for husbands' insurance benefits under § 202(c) of the Social Security Act . . . whose applications, requests for reconsideration, hearings, or Appeals Council reviews have been denied solely because of the statutory requirement in 42 U.S.C. § 402(c)(1)(C) that husbands must have received more than half of their support from their wives in order to be entitled to benefits and . . . such denials have occurred since the 60th day prior to October 5, 1973, . . .; and (2) the insured, married women wage-earners eligible for Social Security benefits whose husbands would be eligible to receive husbands' benefits were it not for the requirement in 42 U.S.C. § 402(c)(1)(C) that husbands have been receiving more than half their support from their wives in order to qualify for benefits.

[Appendix 7.] The Secretary did not file an answer until March 1, 1976. Plaintiffs submitted interrogatories to the Secretary designed at least in part to elicit information necessary to establish the class action allegations in the complaint. The Secretary moved to stay the proceedings; after the parties had briefed the issue, the district court denied the motion on September 24, 1976. Finally, on November 15, 1976 the Secretary filed initial responses to plaintiffs' interrogatories. Plaintiffs moved to certify the classes on February 22, 1977.

Before the Secretary's response was due, however, the Supreme Court issued its decision in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977),[2] holding that the pro-

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[2] The Court's decision is dated March 2, 1977.

visions of § 202(f)(1)(D), 42 U.S.C. § 402(f)(1)(D), which required a widower seeking benefits under the Act to establish that at the time of his wife's death he "was receiving at least one-half of his support" from her, violated the equal protection component of the Fifth Amendment since no similar proof was required of widows. Less than three weeks later, the Court summarily affirmed three district court decisions, holding that the similar requirements of § 202(c)(1)(C) offended the Fifth Amendment.[3] We are informed by the Secretary that "pursuant to" these decisions he "paid, from the effective date of their applications, benefits to all individuals who had obtained a 'final decision' of the Secretary denying them benefits [solely on the basis of § 202(c)(1)(C)], who had instituted suit pursuant to section 205(g) of the Act, 42 U.S.C. 405(g)." [Brief for the Secretary 3.] Accordingly, Roland Wright received husband's insurance benefits "effective from

[3] *Califano* v. *Silbowitz*, 430 U.S. 924 (1977), *aff'g*, *Silbowitz* v. *Secretary of Health, Education and Welfare*, 397 F.Supp. 862 (S.D. Fla. 1975); *Califano* v. *Jablon*, 430 U.S. 924 (1977), *aff'g*, *Jablon* v. *Secretary of Health, Education and Welfare*, 399 F.Supp. 118 (D.Md. 1975) (3-judge court); *Califano* v. *Abbott*, 430 U.S. 924 (1977), *aff'g*, *Abbott* v. *Weinberger*, Civ. No. C-74-194 (N.D. Ohio February 11, 1976). *See also Coffin* v. *Secretary of Health, Education and Welfare*, 400 F.Supp. 953 (D.D.C. 1975), appeal dismissed under Supreme Court Rule 60, *Coffin* v. *Califano*, 430 U.S. 924 (1977); *Hau* v. *Secretary of Health, Education and Welfare*, Civ. No. 74-1016 (D. N.J. July 29, 1976), appeal dismissed under Supreme Court Rule 60, *Califano* v. *Hau*, 430 U.S. 960 (1977).

September, 1971." [*Id.*][4] After paying him retroactive benefits and apparently certifying him for prospective benefits as well, *see* 42 U.S.C. § 405(i), the Secretary moved to dismiss the action as moot.

The district court denied the motion and certified the two classes,[5] ruling that the certification related back to the date the complaint was filed.[6] The court

[4] Although, as noted above, Wright first applied for benefits in September, 1972, § 202(j)(1) of the Act, as amended, 42 U.S.C. § 402(j)(1) provides that,

> [a]n individual who would have been entitled to a benefit under subsections (a) to (g) . . . of this section for any month after August, 1950 had he filed application therefor prior to the end of such month shall be entitled to such benefits for such month if he files application therefor prior to the end of the twelfth month immediately succeeding such month.

Thus the Act itself provides for "retroactive" benefits for a period of up to one year, if the applicant would have been entitled to benefits had he applied.

[5] The first class certified by the district court, namely, husbands who had received denials of benefits based solely on § 202(c)(1)(C) on or after the 60th day prior to October 5, 1973, was also represented in both *Coffin* and *Abbott*. The district court also certified another class comprising the wives of the members of the first class; but the class action allegations in *Coffin* did not include a wife class, although those in *Abbott* did. 42 U.S.C. § 405(g) does not authorize a suit by the members of this second class because none of them applied for benefits, and there was of course no decision of the Secretary denying them benefits which the court could review. We perceive no other theory on which members of this class would have been entitled to relief, but the district court did not order any relief as to this class, so any error in certifying it was harmless.

[6] Compare Rule 15(c), Fed. R. Civ. P.

found that class action allegations covering the members of the class plaintiffs sought to represent were pending in other cases between the time of the Secretary's final denial of the Wright claim and the date the Wrights filed their complaint.[7] The 60-day limitation for filing complaints under 42 U.S.C. § 405 (g) was therefore tolled until after this action was commenced.[8] Finally, since the husband class was

[7] The complaint in *Coffin* v. *Secretary of Health, Education and Welfare*, 400 F.Supp. 953 (D.D.C. 1975), appeal dismissed, 430 U.S. 924 (1977), was filed on October 5, 1973, challenging the constitutionality of § 202(c)(1)(C) on behalf of "all husbands . . . who, but for the dependency requirement, would be eligible for the payment of benefits under 42 U.S.C. § 402(c) . . . ." *Id.* at 956 & n.18.

On July 14, 1975 the court in *Coffin* denied the motion to certify the class. *Id.* But on May 20, 1974 plaintiffs in *Abbott* v. *Weinberger*, Civ. No. C-74-194 (N.D. Ohio February 11, 1976), *summarily aff'd sub nom. Califano* v. *Abbott*, 430 U.S. 924 (1977), had filed a similar challenge to § 202(c)(1)(C) on behalf of "all present and future husbands entitled to Social Security benefits under 42 U.S.C. § 402(c) except for the fact that they are unable to prove at least one-half of their support was supplied by their wives, and who had been or will be denied benefits for that reason." [Plaintiffs' Memorandum in Support of Motion to Certify Class 4.] In *Abbott* the court did not deny class certification until February 11, 1976 [Brief for Plaintiffs, Addendum 3], long after the complaint in this case was filed.

Since the complaint in *Abbott* was also filed on behalf of a class that included plaintiffs and before certification in *Coffin* was denied, the court held that the time limitation did not begin to run even after certification was denied in *Coffin*. *See In re Master Key Litigation*, 70 F.R.D. 29, 32-33 (D. Conn. 1976).

[8] *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 560-561 (1974); *see also Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915, 918-919 & n.6 (7th Cir. 1976).

limited to those who had received denials based *solely* on 42 U.S.C. § 402(c)(1)(C), the district court concluded that each member of the husband class had received a "final decision of the Secretary" for purposes of 42 U.S.C. § 405(g). *See Califano* v. *Goldfarb*, *supra*, 430 U.S. at 203 n.3; *Weinberger* v. *Salfi*, 422 U.S. 749, 764-767 (1975).[9] Having found that it had jurisdiction to review the Secretary's decision as to each member of the husband class, the court, relying on *Goldfarb*, *Silbowitz*, *Jablon*, and *Abbott*, *supra* note 3, entered summary judgment on the merits for plaintiffs, reversing the Secretary's eligibility determination in each case and ordering him,

> to pay each class member all the benefits he would have received had his application for husband's insurance benefits been granted originally without regard to the support requirement of 42 U.S.C. § 402(c)(1)(C).

[App. 100.]

I.

Before turning to the Secretary's sovereign immunity contention, we must deal with two contentions concerning our jurisdiction.

[9] Section 405(g) also seems to require that the Secretary's decision be "after a hearing." But this requirement is also satisfied where, as is the case here, the decision is based solely on a statutory provision claimed to be unconstitutional and the Secretary does not contend that further administrative proceedings could have resulted in any different decision. *See Weinberger* v. *Salfi*, *supra*, 422 U.S. at 767; *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 203 n.3.

The Secretary contends that the district court had no jurisdiction over the claims of the absent class members because the judicial review provisions of the Act, 42 U.S.C. § 405(g), only permit individual actions. The Supreme Court rejected this contention in *Califano* v. *Yamasaki*, —— U.S. —— 99 S.Ct. 2545 (1979), decided after the oral argument in the case at bar: [10]

> where the district court has jurisdiction over the claims of the members of the class in accordance with the requirements set out in § 205(g) [42 U.S.C. § 405(g)], it also has the discretion under Fed. Rule Civ. Proc. 23 to certify a class action for the litigation of those claims.

Id. at 2558. Since each member of the husband class met the requirements of § 205(g), 42 U.S.C. § 405 (g), as construed in *Weinberger* v. *Salfi*, *supra*,[11] the court had jurisdiction over each of their claims. The certification of the wife class is academic since no relief was granted as to them. *See* note 5, *supra*.

Next, the Secretary contends that after Roland Wright had been paid the case was moot and therefore the district court should have dismissed the action. Plaintiffs respond that the case was not moot even as to Wright because the Secretary's erroneous denial of benefits had not been formally reversed. In the alternative, plaintiffs contend that even if

[10] The courts of appeals, including this one, had likewise rejected it. *See Califano* v. *Yamasaki*, *supra*, 99 S.Ct. at 2556 & n.14.

[11] The Secretary does not seem to contend otherwise.

Wright's claim was moot, the claims of the other members of the class were not, and therefore the court properly entered judgment on the merits for them. Of course, plaintiffs' alternative contention depends on the validity of the proposition that the court's certification of the class could relate back to the time the complaint was filed. For until the class was certified, the claims of the class members were technically not before the court and the vitality of their claims could not save an otherwise moot case.

Wright sought a judicial determination that the Secretary's finding that he was ineligible for benefits was erroneous as well as the money he claimed he was entitled to. The Secretary's unilateral decision to give him part of the relief he sought was not sufficient to moot the case. But even if it had been, this court's decision in *Wright* v. *Califano*, 587 F.2d 345, 350 (7th Cir. 1978), following the Second Circuit's decision in *White* v. *Matthews*, 559 F.2d 852, 856-857 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), on this point, requires the conclusion that the district court properly found that certification of the class should relate back.[12] The conceptual difficulties inherent in such a holding [13] did not deter

[12] *See Gerstein* v. *Pugh*, 420 U.S. 103, 110-111 n.11 (1975); *Sosna* v. *Iowa*, 419 U.S. 393, 402 n.11 (1975); *Jones* v. *Califano*, 576 F.2d 12, 22 (2d Cir. 1978). *See also DeBrown* v. *Trainor*, 598 F.2d 1069, 1072 (7th Cir. 1979); *Frost* v. *Weinberger*, 515 F.2d 57, 62-65 (2d Cir. 1975) (Friendly, J.).

[13] *See generally Sosna* v. *Iowa*, *supra*, 420 U.S. at 411-418 (White, J., dissenting).

the Supreme Court from suggesting in *Sosna* v. *Iowa*, *supra*, 419 U.S. at 402 n.11, that class certification may relate back or giving "speedy effect," *Frost* v. *Weinberger*, *supra*, 515 F.2d at 64, to that suggestion in *Gerstein* v. *Pugh*, *supra*, 420 U.S. at 110-111 n.11.

II.

The Secretary contends that the district court's award of "retroactive" relief is barred by the doctrine of sovereign immunity.[14] In *Jimenez* v. *Weinberger*, 523 F.2d 689, 702 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), we rejected an identical argument. According to the Secretary, however, *United States* v. *Testan*, *supra*, requires reconsideration of the point. Although *Testan* discusses the doctrine of sovereign immunity, it is of little relevance in this case, and we adhere to our decision in *Jimenez*, decided only four years ago.

In *Testan* v. *United States*, 499 F.2d 690 (Ct.Cl. 1974), the Court of Claims held that the Classification Act, 5 U.S.C. § 5101, *et seq.*, "gives rise to a claim for money damages [against the United States] for pay lost by reason of . . . allegedly wrongful classifications [of federal employees]." *United States* v. *Testan*, *supra*, 424 U.S. at 399. Any such claim necessarily required a waiver of sovereign immunity. *Ibid.* Plaintiffs argued that the Tucker Act,

[14] *See United States* v. *Testan*, 424 U.S. 392, 403 (1976); *cf. Quern* v. *Jordan*, —— U.S. ——, ——, 99 S.Ct. 1139, 1143 (1979) (Eleventh Amendment); *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974) (same).

28 U.S.C. § 1491, constituted a general waiver of sovereign immunity "with respect to any claim invoking a constitutional provision or a federal statute . . . ." *Id.* at 400. The Court found the argument unpersuasive, explaining that

> the Tucker Act is merely jurisdictional and [the] grant of a right of action [against the United States] must be made with specificity . . . . [T]he asserted entitlement to money damages depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.

Id. (Citation omitted.) Finding no such mandate in either the Classification Act or the Back Pay Act, 5 U.S.C. § 5596, *et seq.*, the Court held that the Court of Claims had no jurisdiction of plaintiffs' claims for reclassification and back pay.

Unlike the plaintiffs in *Testan*, plaintiffs here are not asserting an independent right of action for money damages against the United States. Rather, they seek a judicial determination reversing the Secretary's decision that they were ineligible for benefits under the Social Security Act at the time of their applications. Section 205(g) of the Act unequivocally authorizes the district court to entertain such an action and expressly authorizes a district court "to enter, . . . a judgment . . . reversing the decision of the Secretary . . . ." 42 U.S.C. § 405(g).

The Secretary's decision denying an applicant benefits under 42 US.C. § 402(j)(1) solely on the basis of 42 U.S.C. § 402(c)(1)(C) is no less er-

roneous or subject to correction in a proceeding under 42 U.S.C. § 405(g) than a decision under 42 U.S.C. § 402(c) generally. Reversal of the Secretary's decision as to eligibility necessarily requires the award of "retroactive" relief. It is the date on which the application is filed, and not the date on which the claimant is ultimately determined to be eligible, that triggers his entitlement to benefits under the Act. *See, e.g.*, 42 U.S.C. §§ 402(c), (j)(1). Subject to certain exceptions that are irrelevant here, the language of § 202(j)(1) is mandatory, see note 4, *supra*; a claimant is entitled to "retroactive" benefits for a period of up to twelve months preceding his application.[15] Furthermore, § 204, 42 U.S.C. § 404, directs the Secretary to make proper adjustments "[w]hen-

[15] Indeed, the Secretary's decision to pay complete retroactive benefits to Wright and all other claimants who had been denied benefits on the basis of § 202(c)(1)(C) and were in court in March, 1977, *see* text preceding and note 4, *supra*, suggests that he recognizes the propriety of granting "retroactive" relief in a case in which his decision is reversed. *Califano* v. *Yamasaki*, *supra*, establishes the propriety of using Rule 23, Fed. R. Civ. P., as a vehicle for disposing of more than one case in a single proceeding. The district court here simly reversed the Secretary's decision as to each member of the husband class. Moreover, as noted above, the Secretary has decided to pay complete retroactive relief to all claimants who had been denied husband's benefits solely because they were unable to meet the requirements of § 402(c)(1)(C) and who had fild suit under § 405(g) in March 1977. Apparently, since he took the position that § 405(g) did not authorize class actions, the Secretary did not regard the members of the class as properly in court and therefore did not pay them. In light of the holding in *Califano* v. *Yamasaki*, *supra*, that class actions are proper under 405(g), all members of the class should now be regarded as having been properly in court.

ever [he] finds that . . . less than the correct amount of payment has been made to any person . . . ." Congress has thus unequivocally expressed its intention that a claimant receive the benefits to which he is entitled under the Act, including "retroactive" benefits. The doctrine of sovereign immunity does not require more.[16]

III.

The district court reversed the Secretary's eligibility decision as to each member of the husband class and ordered him "to pay each class member all the benefits he would have received had his application . . . been granted originally . . . ." The Secretary has taken the position that until *Abbott* was decided in March, 1977, the one half support requirements of 42 U.S.C. § 402(c)(1)(C) were valid and enforceable. Therefore, although any person applying for husband's benefits after March, 1977 would be entitled to benefits without regard to § 402(c)(1)(C) for each month thereafter, he would not be entitled to any "retroactive" benefits under 42 U.S.C. § 402(j)(1) because in any month prior to March, 1977 he would not have been entitled to benefits "had

[16] *DeLao* v. *Califano*, 560 F.2d 1384, 1389-1391 (9th Cir. 1977); *Tatum* v. *Mathews*, 541 F.2d 161, 166 & n.5 (6th Cir. 1976); *Johnson* v. *Mathews*, 539 F.2d 1111, 1125 (8th Cir. 1976), are consistent with this opinion. For in each case the court assumed that claimants ultimately found eligible for benefits could recover complete retroactive benefits under the Act. Each of these cases involved claims for benefits which, if granted, would have been directly contrary to Congress' expressed intent under the particular welfare program involved.

he filed application therefor. . . ." *Id.*[17] According to the Secretary, the district court's order is unclear as to whether it includes only those applicants who were denied benefits altogether before March, 1977 or whether it also includes applicants who were only denied retroactive payments under 402(j)(1) after March, 1977.

The district court's order seems both plain and unambiguous. We can find nothing in the order to support the suggestion that it includes only those who had been denied benefits at the time *Abbott* was decided. Nor can the Secretary; to support the contention that the order is ambiguous, he relies on a single sentence from the district court's decision granting plaintiffs' motion for summary judgment. The class certified includes all applicants for husband's benefits "whose applications, requests for reconsideration, hearings or Appeals Council reviews have been denied solely because of the statutory requirement[s] in 42 U.S.C. § 402(c)(1)(C) . . . and [whose] notices of such denials were mailed . . . on or after the 60th day prior to October 5, 1973; . . . ." This language is not limited to applicants who were denied benefits prior to *Abbott* and there is no reason to read such a limitation into the order.

[17] It may be conceded that under some circumstances the existence of a statute later found to have been unconstitutional may nevertheless "have consequences which cannot justly be ignored." *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940). But we need not express any general opinion on the propriety of the Secretary's decision to deny "retroactive" benefits under § 402(j)(1) to those applying after March, 1977, for this case only involves the scope of relief appropriate on direct review of the Secretary's eligibility decision.

In his brief the Secretary argued at great length that under the guidelines established in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the district court's decision was an inappropriate "retroactive" application of *Goldfarb* and *Abbott*. At oral argument, however, he conceded that if the class was properly certified under 42 U.S.C. § 405(g), then all the plaintiffs were properly in court at the time *Goldfarb* and *Abbott* were decided and therefore were entitled to the benefit of those decisions. *See e.g., Jimenez* v. *Weinberger, supra*, 523 F.2d at 702. Thus, *Califano* v. *Yamasaki, supra*, also disposes of this argument.

The Secretary argues that even if the order is not ambiguous, the most "plausible" interpretation is that it is limited to those who applied before March, 1977. We disagree. The most "plausible" interpretation of the language is that which is fairly expressed in the language itself.

We conclude, therefore, that the district court's order requires the Secretary to pay complete retroactive benefits to all applicants for husband's benefits whose notices of denial based solely on 42 U.S.C. § 402(c)(1)(C) were mailed on or after the 60th day prior to October 5, 1973 and before entry of the district court's judgment on October 5, 1977. We see no reason for the further delay which would result from a remand on this point.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 14, 1979

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge

No. 77-2288

ANNA WRIGHT and ROLAND WRIGHT, individually and on behalf of all others similarly situated,
PLAINTIFFS-APPELLEES

vs.

JOSEPH A. CALIFANO, Secretary of the Department of Health, Education and Welfare,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 75-C-3377—Alfred Y. Kirkland, Judge

OPINION BY JUDGE TONE

This cause came on to be heard on the transcript of the record from the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration thereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 23, 1979

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge

No. 77-2288

ANNA WRIGHT, *et al.*, PLAINTIFF-APPELLEES

vs.

JOSEPH A. CALIFANO, *etc.*, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 75-C-3377—Alfred Y. Kirkland, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendant-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3377

ANNA WRIGHT and ROLAND WRIGHT, individually and on behalf of all others similarly situated,
PLAINTIFFS

v.

JOSEPH A. CALIFANO, Secretary of the Department of Health, Education and Welfare,
DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on plaintiffs' Motion to Certify a Class, defendant's Motion to Dismiss the Complaint and the parties' cross-motions for summary judgment. Jurisdiction of the Court is invoked pursuant to 42 U.S.C. § 405(g) and 28 U.S.C. § 1361.

Plaintiffs Roland and Anna Wright are husband and wife who reside in the Northern District of Illinois. The Wrights seek husbands' old-age insurance benefits for Mr. Wright on Mrs. Wright's Social Security account pursuant to § 202(c) of the Social Security Act ("the Act"), 42 U.S.C. § 402(c). Mr. Wright had been denied these benefits solely because of his inability to meet the statutory requirement that husbands receive more than half of their support from their wives, § 202(c)(1)(C). Plain-

tiffs brought this suit within sixty days of defendant's final decision denying benefits.

The Wrights contend, on behalf of themselves and members of the putative class, that the statutory dependency requirement deprives them of equal protection of law guaranteed by the due process clause of the Fifth Amendment since wives applying for old-age benefits on their husbands' accounts are not required to prove dependency.

Plaintiffs' Complaint seeks reversal of defendant's decision denying benefits to Mr. Wright and requests declaratory and injunctive relief against the enforcement of § 202(c) of the Act insofar as it discriminates against individuals solely on the basis of sex. Plaintiffs also request the Court to order defendant to pay benefits to all members of the putative class denied them solely because of their inability to meet the support requirement of § 202(c).

PLAINTIFFS' MOTION TO CERTIFY CLASS

Plaintiffs seek to represent a class consisting of:

> (1) all applicants for husbands' insurance benefits under section 202(c) of the Social Security Act, 42 U.S.C. § 402(c), (an applicant being defined as one who filed a Form SSA-14 "Application for Husband's Insurance Benefits") whose applications, request for reconsideration, hearings or Appeals Council reviews have been denied solely because of the statutory requirement in 42 U.S.C. § 402(c)(1)(C) that husbands must have received more than half their support from their wives in order to be entitled to benefits

and notices of such denials were mailed to the applicants on or after the 60th day prior to October 5, 1973; and (2) the insured, married women wage earners eligible for Social Security benefits who are the wives of those husband applicants. (Plaintiffs' Motion to Certify at 2).

Defendant opposes class certification on several grounds asserting that: (1) class actions may not be maintained under § 205(g) of the Act; (2) the proposed class must be restricted and more accurately defined in order to satisfy the jurisdictional requirements of §§ 205(g) and (h); and (3) plaintiffs are not proper class representatives. Defendant's objections to certification of the class will be considered in order.

Defendant contends that class actions may not be maintained under § 205(g) since the section manifests a congressional intent to bar class suits and to permit adjudication only of individual claims. In support of his contention, defendant argues that the Supreme Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 739 (1975) precludes class actions under § 205 (g) of the Act. This Court does not agree.

In this Court's Order of May 4, 1976 in the related case of *Wright* v. *Mathews*, No. 75 C 1537, this Court held:

> The Seventh Circuit has already ruled in *Jimenez* v. *Weinberger*, 523 F.2d 689 (7th Cir. 1975) that the *Salfi* case did not stand for the proposition that a class action could not be maintained under the Social Security Act. Instead, the *Salfi*

> court found only that the requirements of Rule 23 had not been met.

In *Jiminez* v. *Weinberger*, 523 F.2d 689 (7th Cir. 1975), the court reasoned that:

> Unquestionably § 405(g) [§ 205(g) of the Act] conferred jurisdiction on the district court to hear a timely claim by each individual member of the class; we think Rule 23 [Federal Rules of Civil Procedure] provides a procedure by which such power may be exercised in a single appropriate proceeding. *Id.* at 694-95.

This Court holds that a class action may be maintained pursuant to § 205(g) of the Act.

Defendant next asserts that the proposed class must be more accurately defined and restricted in order to fulfill the jurisdictional requirements of §§ 205(g) and (h). Specifically, defendant contends that no decision of the Secretary is reviewable in district court unless the following prerequisites are satisfied: (1) a "final decision of the Secretary made after a hearing"; (2) a filing within 60 days after mailing of the notice of decision; and (3) a filing within the judicial district in which plaintiff resides, or has his principal place of business. Defendant claims that as defined the proposed class is deficient because it contains members (1) who, at the time of the filing of the Complaint, lacked a "final decision" from the Secretary and (2) who resided in judicial districts other than the Northern District of Illinois.

This Court finds that the failure of some members of the putative class to have received a "final deci-

sion . . . after a hearing" is not fatal to the maintenance of this suit as a class action. Plaintiffs must only have filed a formal application for benefits presenting their individual claims to the Secretary and have received formal denials of their applications, at some level of the administrative process, in which defendant makes clear that the application is being denied solely because of their failure to meet the statutory dependency requirement of § 202(c)(1)(C). Since this statutory requirement is being challenged exclusively on constitutional grounds, once a denial was received *solely* because of this provision, any further administrative appeal would be futile and unnecessary for jurisdiction under § 205(g).

The Supreme Court explicitly adopted this provision in *Weinberger* v. *Salfi, supra*:

> Plainly [the purposes of exhaustion of administrative remedies] have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Once a benefit applicant has presented his or her claim at sufficiently high a level of review to satisfy the Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest. 95 S.Ct. at 2467.

See also *Oliver* v. *Califano*, No. C-76-2397SC (N.D. Cal. June 24, 1977).

Defendant's argument that the proposed class be limited to persons residing in the Northern District of Illinois is without merit. Venue in class actions need only be proper in regard to the representative party, *Appleton Electric Co.* v. *Advance-United Expressways*, 494 F.2d 126 (7th Cir. 1974). Further, the venue requirement of Section 205(g) is not jurisdictional and is waived if not properly raised, *Weinberger* v. *Salfi, supra.* Defendant's objection to venue at this stage of the proceedings is such a waiver, Rule 12(h)(1), Federal Rules of Civil Procedure.

Defendant next contends that any class should be limited to those applicants who received a denial of benefits within sixty days of the date this Complaint was filed. This provision of § 205(g) of the Act is a statute of limitations, *Weinberger* v. *Salfi, supra.*

Plaintiffs argue that the sixty day statute of limitations of § 205(g) was tolled as of October 5, 1973, the date on which a Complaint was filed in the first of two other class actions challenging the constitutionality of the same statutory provision. Certification of classes in both cases were later denied, *Coffin* v. *Secretary of Health, Education and Welfare*, 400 F.Supp. 959 (D. D.C. 1975); *Abbott* v. *Weinberger*, Civil No. C-74-194 (N.D. Ohio, February 11, 1976). Plaintiffs state that the putative class is a subclass of classes sought to be certified in two prior cases.

In *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974) the Supreme Court held that the pendency of a complaint seeking relief for a class tolled the statute of limitations applicable to the

claims of the unnamed plaintiffs. Thus, the statute of limitations on the husband class' claims was tolled by *Coffin* v. *Secretary of Health, Education and Welfare, supra,* until July 15, 1975 when the motion to certify a class in that case was denied. However, by that date *Abbott* v. *Weinberger, supra,* had been filed and was pending. Since the present suit was instituted during the pendency of *Abbott,* the claims of the husband class in this case remain viable and are timely. See *American Pipe and Construction Co.* v. *Utah, supra,* and *In Re Master Key Antitrust Litigation,* 70 F.R.D. 29 (D. Conn. 1976).

Rule 23, Federal Rules of Civil Procedure, establishes the prerequisites to maintainance of a class action. Under Rule 23(b)(2), a class action is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and the representative is seeking "final injunctive relief or corresponding declaratory relief." Such a situation is presented here.

For an action to proceed under Rule 23(b)(2), however, requirements of Rule 23(a) must also be met. Defendant has estimated that the class of husband/applicants numbers approximately one thousand. The wife class is approximately the same size. Thus the numerosity requirement of Rule 23(a)(1) is met.

Since plaintiffs challenge the constitutionality of § 202(c)(1)(C) of the Act, there are questions of law common to the class within the meaning of Rule 23(a)(2). Further, plaintiffs' challenge to § 202

(c)(1)(C) as an unconstitutional denial of equal protection is typical of the claims of the class as required by Rule 23(a)(3).

The Court also finds that the requirements of Rule 23(a)(4) that "the representative parties will fairly and adequately protect the interests of the class," have been satisfied. Defendant contends that plaintiffs' claims are now moot. Although defendant has paid Mr. Wright's claims in full retroactive to the date of his eligibility for husbands' insurance benefits, this Court does not agree with defendant's argument that such payment moots the claims of the class. In *Sosna* v. *Iowa,* 419 U.S. 393 (1975), the Court formulated a three-prong analysis of mootness of the claims of a class:

> There must be not only a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot. *Id.* at 404.

Plaintiffs' response to defendant's assertions is twofold: (1) that the case is not moot as to them and (2) that the case is not moot to the class since certification of a class can relate back to the filing of the complaint.

Plaintiffs first state that since this action was initiated "to review" the Secretary's decision denying

Mr. Wright husbands' insurance benefits and to reverse the decision, the voluntary payment of retroactive benefits does not act to reverse the denial of benefits to Mr. Wright. Thus plaintiffs argue that even as to them the case is not moot.

In support of their contention that the claims of the class are not moot and that they remain proper class representatives, plaintiffs allege that defendant's "wrong" will be continued at least for the class members other than the Wrights. Further, plaintiffs contend that where defendant's remedial measures apply only to the named plaintiffs, the Supreme Court's decision in *Sosna* v. *Iowa, supra,* requires that there be a "relation back" of class certification to the date of filing the Complaint. Plaintiffs argue that the alternative is to allow defendant the opportunity to avoid forever the claims of a class by satisfying small claims of each new named plaintiff. This is particularly apparent here, where after the suit was instituted and after the motion to certify the class was filed, defendant belatedly answered plaintiffs' motion, decided to pay benefits to the named plaintiffs and then sought to have the Complaint dismissed as moot. The character of the lawsuit remains unchanged for the class.

In *Rabinowitz* v. *Board of Junior College District No. 508,* 507 F.2d 1255 (7th Cir. 1974), the Court held:

> It is established doctrine that the voluntary cessation of the complained of action is not sufficient to moot litigation. It must appear with assurance "that 'there is no reasonable expectation that the wrong will be repeated.' " The defendants have the "heavy burden of persuasion." [citation omitted] *Id.* at 1256.

In *Sosna* v. *Iowa, supra,* the Supreme Court recognized that certification of a class can relate back to the filing of the complaint:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the District Court can reasonably rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review. 419 U.S. at 402 n.11.

See also, Gerstein v. *Pugh,* 420 U.S. 103, 110 n.11 (1975) and *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 754 (1976).

In two highly analogous case situations involving constitutional challenges to Social Security benefit delays or denials, courts of appeals have affirmed district courts' actions certifying a class even after the named plaintiff had received the relief sought by the complaints.

In *White* v. *Matthews,* No. 77-6015 (2nd Cir. July 18, 1977), the Second Circuit dealt with issues of mootness and relation back of class certification identical to those raised in this matter. The question was whether to allow class certification in the case to relate back to the time when plaintiff moved for

certification even though prior to the district court's ruling on plaintiff's motion the relief sought had been granted by the Social Security Administration. The Second Circuit affirmed the district court's denial of defendant's claim of mootness of the named plaintiff's claim certification of class.

In *Jimenez* v. *Weinberger, supra,* the Seventh Circuit found the district court's delay in ruling on a motion for class certification was not fatal to the court's power to order class certification and at the same time to adjudicate the merits, nor was it reversible error for the court to do so. While not condoning the lower court's delay, the opinion by then Circuit Judge Stevens plainly recognized that "a reversal of the class aspect of the district court's order would no doubt be followed immediately by a new class action to be brought by a different named plaintiff." 523 F.2d at 700. The policies of avoiding multiple litigation and providing an effective mechanism for enforcement of small claims weighed heavily in the Court's opinion. These same considerations are particularly appropriate in this case.

The issues raised by plaintiffs' Complaint are both typical and representative of those of the numerous members of the putative class. Dismissal of plaintiffs' Complaint or denial of plaintiffs' Motion to Certify the Class would only postpone consideration of issues already clearly before the Court. Plaintiffs have diligently prosecuted this suit on behalf of themselves and the class since the filing of their Complaint in 1975. In light of these factors, defendant's delay

in response to plaintiffs' Motion to Certify the Class, and the payment of benefits to the named plaintiffs during this delay, the words of the Ninth Circuit in *Workman* v. *Mitchell,* 502 F.2d 1201 (9th Cir. 1975) are fitting:

> We think it is particularly appropriate to [find plaintiffs to be appropriate class representatives] where the asserted removal of the named plaintiffs from the class was accomplished by the act of one of the defendants. . . . However meritorious the motive may have been for this transfer, it would be intolerable to permit a defendant in this manner, to destroy the representative capacity of a named plaintiff. *Id.* at 1208.

Accordingly, plaintiffs' Motion to Certify a Class, as defined above, is granted.

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

In light of the foregoing discussion and the granting of plaintiffs' motion for certification of the class, defendant's Motion to Dismiss the Complaint as moot is denied.

PARTIES' MOTION FOR SUMMARY JUDGMENT

In the decisions in *Califano* v. *Goldfarb,* 97 S.Ct. 1021 (March 2, 1977); *Califano* v. *Abbott,* 97 S.Ct. 1540 (March 21, 1977); *Califano* v. *Jablon,* 97 S.Ct. 1539 (March 21, 1977); and *Califano* v. *Silbowitz,* 97 S.Ct. 1539 (March 21, 1977) the Supreme Court

addressed the identical equal protection issue asserted in plaintiffs' Complaint. The Court held unconstitutional the dependency requirement for husbands' benefits (§ 202(c)) and widowers' benefits (§ 202(f)) under the Act. Pursuant to these decisions, all individuals who had obtained a "final decision" of defendant and were properly in court under § 205(g) of the Act at the time of the decisions are to be paid retroactively to the date of their applications.

Based on this Court's resolution of the Motion to Certify a Class and the Motion to Dismiss the Complaint, and the Supreme Court's decisions, this Court grants plaintiffs' Motion for Summary Judgment and denies defendant's Motion for Summary Judgment.

CONCLUSION

Plaintiffs' Motion to Certify a Class is granted.

Defendant's Motion to Dismiss the Complaint is denied.

Plaintiffs' Motion for Summary Judgment is granted.

Defendant's Motion for Summary Judgment is denied.

ENTER: /s/ Alfred Y. Kirkland
ALFRED Y. KIRKLAND
Judge

Dated: Sep. 21, 1977

[SEAL]

APPENDIX E

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, Washington, D.C. 20013
21 Aug. 1975

Refer to:

IHA-2
328-01-9067

Bureau of
Hearings and Appeals

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Roland Wright
Box 142
Bristol, Illinois 60512

Dear Mr. Wright:

Your request for review of the decision in your case has been carefully considered by the Appeals Council. The Council considered all the evidence in your case, the applicable law and regulations, the reasoning and the evaluation of the facts in the decision, and your reasons for believing that your claim should be allowed.

The Appeals Council has decided that the decision is correct. Further action by the Council would not, therefore, result in any change which would benefit you. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action, within sixty (60)

days from the date of this letter, in the district court of the United States in the judicial district in which you reside. See section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)), and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant. Also, please include your social security number in the bill of Complaint.

Sincerely yours,

/s/ Harriet Simon
HARRIET SIMON
Member, Appeals Council

cc:
Ms. Jane G. Stevens
Chicago, Illinois 60604

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING DECISION

In the case of

ROLAND A. WRIGHT
(Claimant)

ANNA E. WRIGHT
(Wage Earner)

Claim for

Husband's Insurance Benefits

328-01-9067
(Social Security Number)

This matter arises pursuant to section 205(b) of the Social Security Act, as amended (42 U.S.C. 405 (b)) on a request for hearing filed by Roland Alfred Wright, the claimant herein. The claimant is dissatisfied with prior determinations by the Social Security Administration to the effect that he is ineligible for husband's insurance benefits under section 202(c) of the Social Security Act (42 U.S.C. 402(c)) for which he had filed a claim on the Social Security account (328-01-9067) of his wife, Anna E. Wright. A hearing at which the claimant and his wife personally appeared and testified was held before the

undersigned Administrative Law Judge on July 15, 1975, at Chicago, Illinois. Claimant was represented by Jane G. Stevens, Attorney at Law, Legal Assistance Foundation, 64 East Jackson Boulevard, Chicago, Illinois 60604.

STATEMENT OF ISSUES AND APPLICABLE LAW

The general issue is whether the claimant is entitled to husband's insurance benefits on the Social Security account of his wife, Anna E. Wright. The answer to this question turns on whether the claimant was receiving at least one-half of his support from his wife at the time she became entitled to retirement insurance benefits, i.e. as of August 11, 1967, pursuant to the requirements of section 202 (c)(1)(C) of the Act (42 U.S.C. 402(c)(1))(C)) which deals with entitlement to husband's insurance benefits and states as follows:

Husband's Insurance Benefits

> (c)(1) The husband (as defined in section 216 (f) of an individual entitled to old age or disability insurance benefits, if such husband—
>
> (A) has filed application for husband's insurance benefits,
>
> (B) has attained age 62,
>
> (C) was receiving at least one-half of his support, as determined in accordance with Regulations prescribed by the Secretary, from such individual
>
> * * * * *

> (ii) * * * at the time she became entitled to such benefits
>
> * * * * *
>
> shall be entitled to a husband's insurance benefit for each month, beginning with the first month after August 1950, in which he becomes so entitled to such insurance benefits * * *.

Social Security Administration Regulations (20 C.F.R. 404.316 to 404.319) contain the same requirements as the statute with regard to conditions of entitlement to husband's insurance benefits.

Additionally, Social Security Administration Regulations (20 CFR 404.350) which contain pertinent definitions state as follows:

> Section 404.350 "One-half support" defined.
>
> (a) Applicability. One of the requirements for entitlement to a husband's, widower's, or parent's insurance benefit under section 202(c)(1)(C), 202(f)(1)(D), and 202(h)(1)(B)(i) of the Act, respectively, is that the person claiming such benefit was receiving at least one-half support from the insured individual at a specified time.
> * * *
>
> (b) What constitutes "at least one-half support." * * * a person is receiving at least one-half of his support from the insured individual at a specified time, if such individual, for a reasonable period (as defined in paragraph (c) of this section) before the specified time, made regular contributions, in cash or kind, to such person's support and the amount of such contributions equaled or exceeded one-half of such person's support during such period. * * *

(c) "Support" defined. The term "support" includes food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for maintenance of the person supported.

* * * * *

(e) "Reasonable period" defined. (1) Ordinarily, a period of twelve months (except where there is a change in the support situation in such period) ending with the specified time is a reasonable period for purposes of determining whether the one-half support requirement is met at the specified time.

In the prior determinations, the Social Security Administration concluded that the claimant had not received at least one-half of his support from his wife during the twelve-month period ending with the close of August 1967, when she became entitled to retirement insurance benefits.

SUMMARY OF THE EVIDENCE

Evidence of record indicates that Mrs. Anna E. Wright, claimant's wife, filed an application for retirement insurance benefits on August 11, 1967 (Exhibit 1) and became entitled to such benefits at the time of her application. However, payment of benefits were deferred or suspended because she continued in full-time employment at that time and thereafter until September 1971.

Claimant Roland A. Wright, date of birth September 26, 1901, filed an application for husband's benefits on September 1, 1972 (Exhibit 4) based on

the Social Security account of his wife. On this same date Mrs. Wright filed a wife's certificate and statement indicating contributions to household expenses for the period of September 1, 1966 to August 31, 1967 (Exhibit 5, page 2.) for a three-member household, consisting of Mrs. Wright, the claimant, Roland A. Wright, and Mrs. Wright's father, Edward Nettleingham. In this statement total household expenses was listed as $7495.67, based on the total contributions by the three household members with the pro-rata cost of living for each indicated as $2498.55. Additionally, the statement indicated that Mr. Wright's actual contribution was $1521.70. The claimant and Mrs. Wright then developed and showed in the statement a formula of dividing Mr. Wright's contribution of $1521.70 by one-half showing this one-half as $760.85. Then, Mrs. Wright indicated, that after contributing from her funds to the cost of living of her father, she had $976.87 left to contribute to Mr. Wright's cost of living, which she then claimed was more than half the amount contributed by Mr. Wright, and she therefore allegedly paid for more than one-half of his support.

The record also contains a Certificate of Support filed by the claimant, Roland A. Wright, for the year ending August 31, 1967 (Exhibit 7) in which he listed his income for that period as totalling $1521.70, consisting specifically of $720 in Veteran's benefits, $475.20 in Social Security benefits on his own account, $318.83 of income from stocks, bonds, and securities, and $7.67 in miscellaneous income. The

Certificate also indicated that their dwelling in Bristol, Illinois, was owned jointly by the claimant, his wife, and his father-in-law. It was further indicated with regard to real estate taxes that Mr. Nettleingham, the father-in-law, paid $67.96 and Anna Wright paid $40.10; and as to repairs Mr. Nettleingham paid $20 and Mrs. Wright $90.14. Mrs. Wright also paid personal property taxes of $37.16.

At the hearing Mr. and Mrs. Wright testified that during the year ending August 31, 1967, Mr. Wright did not share a common household with his wife and father-in-law. He had gone to Tennessee where he formerly worked to see about a job. He did not obtain the job but he continued to live by himself in Tennessee during the year ending August 1967, while his wife and father-in-law lived in Bristol, Illinois.

In Tennessee claimant rented a house for $50 a month, and his monthly food expense he testified was $35. He allegedly had other expenses consisting of utilities (electric and water) and miscellaneous personal expenses. He has no breakdown of these expenses but he testified that he lived in Tennessee on his $1521.70 income, and he did not have any other expenses there and his wife sent him no cash. He further stated that while he was living in Tennessee, he and his wife segregated their income.

The claimant and Mrs. Wright further testified that there were expenses in Bristol, Illinois, which they considered attributable in part to Mr. Wright, for the year ending August 1967, as follows: Real Estate taxes on the dwelling—$108.06; personal property taxes $37.16 on furniture and other personally owned jointly by claimant and his wife; automobile insurance of $120 on an automobile owned jointly by claimant and his wife; State automobile license fee—$18.50; repairs and oil changes on automobile—$300 and gasoline at $8 a week—$416; lawn mowing service at $5 a week from April up to November—$150; lawn mower repair $35; utilities (electric) $66; Blue Cross—Blue Shield premiums paid by Mrs. Wright for the claimant at $12.45 a quarter—$49.80; safe deposit box rental $4; rent for use of dwelling paid by Mrs. Wright to her father, notwithstanding that she was an owner, $30 a month—$360; fire insurance policy for the dwelling $33 for three years or $11 per year; annual union dues, which Mrs. Wright paid in connection with her job $48; total church contributions of $442.79 and miscellaneous contributions of $3.50 paid in the calendar year 1966, and total church and miscellaneous contributions of $543.86 paid in calendar year 1967.

Claimant and Mrs. Wright testified that they had no repairs on the house in Bristol, Illinois during the year ending August 1967, but as indicated the certificate filed by Mr. Wright (Exhibit 7) shows repair costs of $90.14 paid by Mrs. Wright and $20 paid by Mr. Nettleingham. The witnesses testified that they had no life insurance expenses or medical bills during the year ending August 1967. With regard to automobile expenses, the witnesses stated that Mrs. Wright used the automobile exclusively during the period in question in commuting to her job, and

also for personal use in shopping, going to church, etc. Mr. Wright, living in Tennessee, did not use the automobile.

EVALUATION OF THE EVIDENCE

The applicable statutory provisions and regulations as presently constituted have been cited earlier in this decision.

The Social Security Administration in its determination (Exhibit 12) assumed that Mr. and Mrs. Wright and Mrs. Wright's father, Edward Nettleingham, were, during the year ending August 31, 1967, sharing a common household in Bristol, Illinois, and it was further presumed, in the absence of a specific breakdown of expenses, that as part of the same household, each family member had common expenses and each shared equally in the funds available for their support, and that the cost of living for each was one-third of the total available funds. Under this theoretical formula the total funds of $7,495.67 available for support were divided by the three family members and the pro rata cost of support for each individual was $2,498.55. One-half of this amount is $1,249.28, and since Mr. Wright had personal income of $1520.70, or more than one-half of the cost of his support, it was concluded that he did not receive one-half of his support from Mrs. Wright. This theoretical formula, however, based on a common household and common household expenses, is not applicable in the instant case, in the opinion of the undersigned, since Mr. Wright was living by

himself in Tennessee, and was not during the pertinent time part of the household in Bristol Illinois.

The alternative method of computing support submitted by the claimant's attorney, and the Wright's is similarly inapplicable since it too is based on the individual's living in a common household and having common expenses, and dividing their income into one-thirds, and supporting each other out of the collective fund. Under this method it is contended that Mrs. Wright's one-third contribution to the support of Mr. Wright would amount to more than one-half of his one-third contribution.

Since Mr. Wright was living in Tennessee, it is not necessary to indulge in a theoretical computation of living expenses, based on the theory of a common household. Mr. Wright's actual cost of living was the monies he expended for his living expenses in Tennessee, plus certain common expenses which he shared with his wife and for which he was obligated in Bristol, Illinois. Mr. Wright testified that he lived in Tennessee on his income of $1521.70, and that no cash was sent to him by his wife. The following are considered by the undersigned to be common expenses for which Mr. Wright was obligated in part: Real Estate taxes $108.06 of which Mr. Wright's one-third share was $36.02; building repairs of $110.14 with Mr. Wright's one-third share amounting to $36.71; fire insurance on the dwelling of $11 with one-third attributable to Mr. Wright—$3.67; automobile insurance to protect commonly owned property, totalling $120 with Mr. Wright's one-half share amounting to $60; auto license fee of

$18.50 with Mr. Wright's one-half share $9.25; personal property tax on furniture $37.16 with Mr. Wright's one-half share amounting to $18.58; lawn mowing service for seven months for maintenance of the commonly owned property, $150 with Mr. Wright's one-third share amounting to $50; lawn mower repair $35. Mr. Wright's one-half share—$17.50; rental of safe deposit box $4, Mr. Wright's one-half share—$2; church and miscellaneous contributions as indicated by income tax returns, averaging $495.00 a year, Mr. Wright's one-half share $247.54. Mrs. Wright also paid quarterly Blue Cross-Blue Shield premiums of $12.45, totalling $49.80 for Mr. Wright.

Mrs. Wright also testified as to other expenses which she had and for which she paid such as gasoline, oil changes, and automobile tune-ups, rental of $30 a month which she paid to her father notwithstanding her ownership interest in the dwelling, electric bills for the house where she lived, and her union dues. These expenses, however, refer specifically and exclusively to Mrs. Wright's own cost of living and are not attributable to Mr. Wright.

Mr. Wright's actual living expenses as previously indicated, were the $1521.70 of his monies which he expended in Tennessee, plus his share of the common expenses and the Blue Cross-Blue Shield premiums which all together totalled $2052.77. Of this sum Mr. Wright admittedly paid $1521.70 from his own income, and Mrs. Wright paid $531.07. It follows that Mrs. Wright did not contribute one-half or more to Mr. Wright's support during the year ending August 1967, when she became entitled to retirement insurance benefits.

It has also been argued by claimant's attorney that the provision of section 202(c)(1)(C) of the Social Security Act, which requires as a condition of eligibility that a husband receive at least one-half support from his wife violates the equal protection structures of the due process clause of the Fifth Amendment to the United States Constitution, and is unconstitutional. However, the Federal District Court cases cited are from other judicial circuits, and are not necessarily controlling. Two United States Supreme Court decisions referred to in the District Court opinions rule on other statutory provisions, and may be distinguishable on both the law and facts from the instant case. In any event, it is the opinion of the undersigned that he is without legal authority to rule unconstitutional section 202(c)(1)(C) of the Social Security Act. *Engineers Public Service Company* v. *SEC*, 138 F.2d 936, 952-953, dismissed as moot 332 U.S. 788, 68 S. Ct. 96; *Central Nebraska Public Power and Irr. Dist.* v. *FPC*, 160 F.2d 782, cert. den. 332 U.S. 765, 68 S. Ct. 72; *Panitz* v. *Dist. of Columbia*, 112 F.2d 39, 41, 42; *Public Utilities Commission* v. *United States*, 355 U.S. 534, 539, 78 S. Ct. 446, 450.

FINDINGS

Based upon the weight of the evidence the following findings are made:

1. Mrs. Anna E. Wright filed application for retirement insurance benefits on August 11, 1967, and became entitled to such benefits at that time.
2. Roland A. Wright, date of birth September 26, 1901, husband of Anna E. Wright, filed application for husband's insurance benefits on September 1, 1972.
3. During the twelve month period ending in August 1967, the date of Mrs. Wright's entitlement to retirement insurance benefits, claimant Ronald A. Wright, did not receive at least one-half of his support from his wife, Anna E. Wright.
4. Since the one-half support requirement of section 202(c)(1)(C) is not satisfied, claimant does not meet the eligibility requirements of the said section.

DECISION

Pursuant to the evidence in its entirety and the foregoing findings, it is the decision of the undersigned Administrative Law Judge that the claimant is not entitled to husband's insurance benefits under section 202(c)(1)(C) of the Social Security Act, for which he filed application on September 1, 1972.

/s/ Irwin I. Blumberg
IRWIN I. BLUMBERG
Administrative Law Judge

Date: July 31, 1975

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Supreme Court, U. S.
FILED
JUN 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-1454

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN RESOURCES, PETITIONER

v.

ANNA WRIGHT AND ROLAND WRIGHT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1454

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN RESOURCES, PETITIONER

v.

ANNA WRIGHT AND ROLAND WRIGHT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

1. Respondent is in error in suggesting (Br. in Opp. 9) that our petition sought plenary review of the mootness issue only if we prevailed on that issue in *United States Parole Commission* v. *Geraghty*, No. 78-572 (Mar. 19, 1980). To the contrary, we suggested that if the Court accepted our mootness argument in *Geraghty*, this case should be remanded to the court of appeals for reconsideration of that question (Pet. 16). We did point out that the mootness issue in *Geraghty* was "closely related" to the issue involved here and thus that the Court's decision in *Geraghty* would bear on the proper disposition of the petition in this case (Pet. 8-10).

Having reviewed the decisions in *Geraghty* and in *Deposit Guaranty National Bank* v. *Roper*, No. 78-904 (Mar. 19, 1980), we submit that, in light of the factors this

Court relied on in those cases, there are significant differences between *Geraghty* and *Roper* and this case. These factors not only make this case a logical vehicle for further consideration of the complex question of mootness in the class action context, but also require a different result here than that reached in *Geraghty* and *Roper*.

If this Court grants our petition, we will, of course, discuss those differences in detail. In brief, we submit that the Court's decision in *Roper* turned on the fact that the named plaintiffs there had *rejected* the tendered settlement and that the mere tender of settlement by a defendant should not deprive the plaintiffs of the economic advantages of prosecuting a class action (slip op. 12-14; see also Rehnquist, J., concurring, at 2). In contrast, the named plaintiffs here *accepted* the tendered payment; a holding that this acceptance rendered the case moot would not have the adverse effects identified in *Roper*.

Moreover, in *Roper* as in *Geraghty*, the Court stressed the fact that the district court had denied class certification *before* the named plaintiffs' claims had become moot. The Court therefore concluded in each case that the named plaintiffs retained an interest in appealing the adverse ruling on the class action question sufficient to prevent the expiration of their substantive claims from mooting the entire case (*Roper* slip op. 9-12; *Geraghty* slip op. 11, 13, 15-16).[1]

---

[1]The Court in *Geraghty* emphasized that: "Our holding is limited to the appeal of the denial of the class certification motion. * * * We decide only that Geraghty was a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined" (slip op. 15, 18-19). This ruling, the Court noted, followed from its decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), that a named plaintiff may not take an interlocutory appeal of the denial of class certification under 28 U.S.C. 1291. See *Geraghty* slip op. 11; *Roper* slip op. 11. If interlocutory appeals of such orders had been allowed in *Livesay*, the named plaintiffs in *Geraghty* and *Roper* could have sought appellate review of the denial of class certification at a time when their substantive claims plainly had not yet become moot. In such circumstances, it was appropriate to allow them to pursue the class action question after a final judgment on the merits. In this case, however, the district court did not act on the class certification motion until *after* respondent's claim had become moot.

In neither case did the Court consider the precise issue presented here: whether a case becomes moot when the named plaintiff accepts a proffered settlement before the district court acts on his motion to certify the class.[2] In that situation, the named plaintiff cannot assert a right to appellate review of a decision made while he unquestionably retained a justiciable interest in the case. Instead, the district court had no jurisdiction to pass on the class certification question at all. Cf. *Geraghty* slip op. 15-16 (noting that if class certification was correctly denied, the claim must be dismissed as moot).[3]

---

[2]The Court did suggest in *Geraghty* that the case would be moot if the named plaintiffs had lost their personal stake in the outcome *before* class certification was denied (slip op. 18 n.11), a situation closely analogous to that of respondent here.

[3]Indeed, if respondent is correct in his assertion that the district court in this case had jurisdiction to certify a class *after* his claim became moot, there would have been no need for this Court to have relied on the "capable of repetition, yet evading review" doctrine to avoid mootness in *Gerstein* v. *Pugh*, 420 U.S. 103, 110-111 n.11 (1975). As the Court noted in *Geraghty* (slip op. 10), however, in cases such as this one that are not "inherently transitory" and where "there is no chance that the named plaintiff's expired claim will reoccur," mootness can be avoided only "through certification of a class *prior to* expiration of the named plaintiff's personal claim" (emphasis added).

In sum, this case presents the Court with the opportunity to clarify further the " 'uncertain and shifting contours' " of the mootness doctrine in the class action context (*Geraghty* slip op. 12, quoting *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968)) and to provide needed guidance to the lower courts in this area (see cases cited in *Geraghty* slip op. 2 n.2).

2. Nor can dismissal for mootness be averted on the ground that the case would otherwise become capable of repetition yet evading review. *Gerstein* v. *Pugh*, 420 U.S. 103, 110-111 n.11 (1975). Apparently recognizing that the instant controversy is not so transient in character that review would otherwise be unavailable, respondent argues that review is nonetheless required because of the Secretary's "unilateral action" in satisfying the named plaintiff's particular claims. But when, as clearly appears from our petition (pages 5-6, 9), the Secretary's payment was made in good faith and not to avoid litigation of the merits of the class claim, this extraordinary exception to the mootness doctrine does not apply.[4]

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[4]The cases cited by respondent (Br. in Opp. 11-12) are not to the contrary. *Hines* v. *City Finance Co. of Eastover*, 474 F. 2d 430, 433 n.6 (D.C. Cir. 1972), simply raises the question whether, "assuming arguendo" that defendant's action had mooted part of the case as to the named plaintiffs, the suit could still be maintained by the class; it does not resolve that question. Most of the other cases respondent cites involve situations in which the defendants did not provide the named plaintiffs with complete relief: *DeBrown* v. *Trainor*, 598 F. 2d 1069 (7th Cir. 1979); *White* v. *Mathews*, 559 F. 2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978) (in suit challenging failure to conduct prompt hearings on entitlement to disability insurance benefits, case was not mooted by agency's belated grant of hearing to named plaintiff only after class suit filed); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1968); *Cypress* v. *Newport News General and Nonsectarian Hospital Association*, 375 F. 2d 648 (4th Cir. 1967); cf. *Horn* v. *Associated Wholesale Grocers, Inc.*, 555 F. 2d 270, 277 (10th Cir. 1977) (employee in civil rights case has a continuing interest in eliminating employer's patterns of discrimination).

In *Workman* v. *Mitchell*, 502 F. 2d 1201 (9th Cir. 1974), the court concluded that the district court had improperly refused to certify a class of prisoners challenging prison conditions and that the case had not been mooted by the release of three of the named plaintiffs and the transfer of the fourth after the case was on appeal. The court noted that "it would be intolerable to permit a defendant, in this manner [*i.e.*, by transferring plaintiff out of the prison] to destroy the representative capacity of a named plaintiff" (*id.* at 1208). This case is thus quite similar to *Geraghty* and *Roper*—the named plaintiffs retained their right to challenge the denial of class certification. Moreover, the court's focus on the single plaintiff whose representative capacity was destroyed by the unilateral action of the defendant distinguishes this case from the instant case, in which respondent accepted the proffered payment, thus by his own actions relinquishing his interest in the case.

Finally, Section 1776 of 7A C. Wright & A. Miller, *Federal Practice and Procedure: Civil* (1972), to which respondent also refers (Br. in Opp. 12), deals only with civil rights actions, which, as *Horn* v. *Associated Wholesale Grocers, Inc.*, *supra*, suggests, involve different considerations. Moreover, the discussion focuses on the situation in which the settlement with the class representatives occurs *after* the class has been certified and thus is itself properly before the court.

3. Respondent also contends that various sections of the Social Security Act to which we did not refer in our petition constitute a waiver of sovereign immunity with regard to retroactive payments (Br. in Opp. 17-18). He refers to four sections: (1) 42 U.S.C. 402(c), the provision defining entitlement to husband's benefits, which, by conditioning eligibility on dependency expressly *denies* benefits to those, like respondent, who cannot meet that test; (2) 42 U.S.C. 404(a), defining procedures for the retroactive readjustment of benefits administratively when more or less than the "correct" payments have been made—a provision that, like Section 402(j)(1) (to which

we referred in our petition (pages 11-12)), contemplates retroactive payment of benefits to which an individual is entitled under the terms of the statute as enacted; (3) 42 U.S.C. 405(g), which provides for judicial review of agency decisions but says nothing about the scope of the remedy available if the Secretary's decision is reversed; and (4) 42 U.S.C. 406(b), which limits attorney's fees to "25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment" and contemplates that the "past-due benefits" include simply the "total accumulated amount of benefits payable under * * * the Act" (20 C.F.R. 404.975(c)). It is obvious that none of these provisions constitutes the unequivocal waiver of sovereign immunity required by *United States* v. *Testan*, 424 U.S. 392, 399 (1976). See also *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op 3.

More generally, respondent's discussion of the sovereign immunity issue confuses the provisions that clearly permit judicial *review* of the Secretary's decision denying the award of benefits with the scope of the *remedy* the courts may award once that denial has been determined to be based on an unconstitutional requirement of the statute.[5]

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1980

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[5]This same confusion is also evident in *Cash* v. *Califano*, No. 79-1279 (4th Cir. May 19, 1980), slip op. 14-15, which follows the decision below in granting retroactive benefits to a non-dependent widower.